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ONE of the fascinating new games being played by some law professors and others," declared an *American Bar Association Journal* editorial almost a decade ago, "is to compute the 'box scores' of the votes of justices of the Supreme Court in various important lines of cases."[1] The present article is not intended as an addition to the work of those engaged in this sort of "numbers game." However useful the statistical method may be in providing the empirical data upon which legal analysis can be based, it should be almost self-evident that its value as *the* key to the working of the highest Court must be limited. The fallacy in this method lies in its single valued criterion of judgment. The Supreme Court and its members can be judged intelligently only from a many-sided viewpoint—not solely from the standpoint of "for" or "against."

To obtain an adequate picture of the high bench in operation, it is necessary to analyze the Court's decisions themselves, not merely to tabulate the justices' votes on an IBM machine. Such analysis of the decisions of a particular term enables the Court to be seen as a living institution. A survey of this kind need not focus on every decision and every vote. It deals instead with selected cases of consequence, seeking to present the main themes of the Court's work. If properly done, such a presentation can permit the reader to keep abreast both with the principal trends of our public law and with the year-to-year development of our unique highest tribunal from an institutional point of view.

The October 1957 term found the Supreme Court increasingly in the position of a storm center in our governmental system. Indeed, a popular account went so far as to assert, "The grave truth is that the Court is involved in a crisis of doubt, possibly

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1 36 A.B.A.J. 41 (1950).

the most serious crisis which has confronted it since its power and duty to 'say what the law is' were established in the early 1800's."[2] The recent attacks culminated in a powerful attempt in the 85th Congress drastically to curtail the Court's authority, which received unexpectedly strong support in the Senate. The assaults on the high bench constitute the indispensable background to the work of the Court itself. Thus, it cannot be denied that several of the decisions (and especially the way in which they were rendered) have added fuel to the controversy.

It would be unrealistic not to expect the present furor to have repercussions even within the marble palace in which the highest tribunal sits. Throughout its history, in fact, the Court has constantly remolded its jurisprudence to accord with the demands of the community. During the past term, one may note a change in the justices' approach to the power of the states. Significant assertions of state authority, that might have been stricken down in prior terms as inconsistent with federal power, were upheld. This is not to say, to be sure, that the Court must retract its decisions simply because there is disagreement with them. In the area of racial discrimination, to take the outstanding example, the violent reaction of a portion of the country has not led to any wavering in the application of the principle announced four years ago in *Brown v. Board of Education*.[3] On the contrary, the decision in the *Little Rock*[4] case at a special term in August 1958 shows clearly that the *Brown* principle will not be defeated "merely because there are those elements in the community that would commit violence to prevent it from going into effect."[5]

Integration and Intimidation

Some of the most dramatic moments of recent Supreme Court history have come during special terms called to resolve issues which could not wait for the regular October term. It was during such special terms that the high tribunal decided both the case of the German saboteurs during the last war[6] and that of the Rosenbergs,[7] which was inflated into the cause célèbre of the

2 Osborne, in LIFE, June 16, 1958, p. 93.
3 347 U.S. 483 (1954).
4 Cooper v. Aaron, 358 U.S. 1 (1958).
5 Warren, C. J., during oral argument, August 28, 1958. N.Y. TIMES, Aug. 29, 1958, p. 8:3.
6 Ex parte Quirin, 317 U.S. 1 (1942).
7 Rosenberg v. United States, 346 U.S. 273 (1953).

"cold war" period. Yet even those cases did not compare in sheer drama with the ruling of the Court in its August Special Term 1958, when the *Little Rock* school integration case[8] was decided.

The real issue in the *Little Rock* case was that of whether an express constitutional provision must yield to the ebb and flow of popular sentiment. The Court's decision in the *Brown* case in 1954[9] clearly laid down the principle that public school segregation violates the equal protection clause of the Fourteenth Amendment. In 1955, the Court declared that the states must take such steps as are necessary to insure that Negroes are admitted to public schools on a non-discriminatory basis "with all deliberate speed."[10]

In Little Rock, Arkansas, the application of the high bench's desegregation ruling was flaunted by local lawlessness, aided and abetted by the Governor of Arkansas, who had originally barred integration with the use of National Guardsmen. Although nine Negroes were ultimately admitted to Central High School in Little Rock, a campaign of harassment was launched by extremist elements which, in the words of the local school board asking for a two-and-a-half year suspension of the integration program, created "intolerable conditions" at Central High. It was the school board's petition for a stay of desegregation that gave rise to the high Court's decision on September 12, 1958, unanimously ordering immediate resumption of integration in Little Rock.

From a purely legal point of view, the *Little Rock* case itself was not nearly as difficult as the controversy surrounding it. As Chief Justice Warren succinctly stated in the 1955 *Brown* opinion, "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[11] There is no warrant for the proposition that express constitutional rights must be watered down by violent opposition to them. On the contrary, it is normally thought that just such opposition brings into sharp focus the essential function performed by judicial enforcement of fundamental rights in particular cases. "What is there," asked the Solicitor General during the *Little Rock* oral argument, "in this commu-

[8] 358 U.S. 1 (1958).
[9] 347 U.S. 483 (1954).
[10] Brown v. Board of Education, 349 U.S. 294 at 301 (1955).
[11] Id. at 300.

nity, in Little Rock, in Arkansas, that is different?"[12] Answering this query, Mr. Rankin declared, "The element in this case is lawlessness. It is a community . . . who decided they were going to defy the laws of this country."[13]

Of course, as already noted, there is normally a clear relationship between the decisions of the highest Court and public sentiment. But that hardly requires the justices to give way to open violence intended to thwart enforcement of an express constitutional provision like the equal protection clause. "There can," to quote the Solicitor General again, "be no equality of justice for our people if the law steps aside, even for a moment, at the command of force and violence."[14]

If our constitutional history teaches anything, it is that there can be no real Constitution without law administered through the Supreme Court. But this necessarily presupposes compliance with the law declared by the Court. Indeed, respect for the Court's decisions is the sine qua non of our constitutional structure; draw out this particular bolt and the machinery falls to pieces. To allow a Supreme Court decision to be frustrated by violence is to take the fatal first step toward abrogation of the rule of law: "To yield to such a claim would be to enthrone lawlessness, and lawlessness if not checked is the precursor of anarchy."[15]

Covenants without the sword, says Hobbes in a famous passage, are but empty words .The same is true of a Constitution that cannot be enforced by the courts. How vain are such words if they may be heeded or not at will! Of what importance is it to say the states are prohibited from doing certain acts if the states recognize no legitimate authority to determine whether an act done *is* a prohibited act? If a state governor asserts that he alone is to decide on his own powers, does not the Constitution itself, in the words of the *Little Rock* opinion, become "a solemn mockery?"[16]

Presidential Removal Power

Wiener v. United States[17] did not receive the public attention which has been focused upon some of the Court's more contro-

12 N.Y. TIMES, Sept. 12, 1958, p. 13:7.
13 Ibid.
14 Id., col. 8.
15 Frankfurter, J., concurring in Cooper v. Aaron, 358 U.S. 1 at 22 (1958).
16 Id. at 18.
17 357 U.S. 349 (1958).

versial recent decisions. In many ways, all the same, *Wiener* is a case as important as any which the high bench decided this past term. At issue in it was a power which goes to the very heart of our governmental structure, namely, the authority of the President to remove federal officials.

"Controversy pertaining to the scope and limits of the President's power of removal," states Justice Frankfurter, "fills a thick chapter of our political and judicial history."[18] The removal power is the key to the President's essential role as the administrative chief of the government. Without it, he would be relegated to a largely ceremonial status, utterly inconsistent with his constitutional power to execute the laws.

Before *Wiener,* the removal power had already given rise to two cases that became constitutional causes célèbres. In the 1926 *Myers* case,[19] speaking through a Chief Justice who himself had served as Chief Executive, the Court found in the President a very broad removal power. *Myers* itself dealt with the removal of a postmaster. But the Court there did not restrict itself to the immediate issue and announced instead an inherent power in the President to remove all officials whom he appoints.

The *Myers* principle was, however, soon seen to be inconsistent with the proper functioning of the quasi-judicial administrative agency which has become so important a part of the contemporary governmental scene. In the 1935 *Humphrey* case,[20] the Court held that the President did not have the power to remove at will a member of such an agency. *Humphrey* arose out of the attempt by President Roosevelt to remove a member of the Federal Trade Commission from office on the ground that the aims and purposes of his administration could be carried out most effectively with personnel of his selection. The applicable statute provided that FTC commissioners were to hold office for terms of seven years and also provided for their removal by the President for "inefficiency, neglect of duty, or malfeasance in office." According to the *Humphrey* Court, the President's removal power over members of a body like the FTC was limited to removal for these specified causes.

18 Id. at 351.
19 Myers v. United States, 272 U.S. 52 (1926).
20 Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Myers and *Humphrey* did, it is true, resolve most of the questions concerning the presidential removal power. But an important area of doubt still remained. *Myers* recognized in the President unfettered removal authority over "all purely executive officers."[21] *Humphrey* held that the Congress could limit the President's power to removal for cause, so far as members of quasi-judicial agencies were concerned. What happens when nothing is said in the relevant statute about removal?

The *Wiener* decision answers this question. On its facts, *Wiener* was similar to *Humphrey*. Wiener, like Humphrey before him, had been removed from a quasi-judicial agency (this time the War Claims Commission[22]) by the President because he wanted to staff the agency "with personnel of my own selection." In Wiener's case, however, Congress had made no provision with regard to the removal of the commissioners concerned.

According to a unanimous Court the failure of Congress to say anything about removal did not vest in the President the power to remove at will. On the contrary, in the case of a commission endowed with substantial adjudicatory authority, the removal power exists only if the Congress may fairly be said to have conferred it specifically.

In determining whether the President has the power to remove, in other words, the key element today is the nature of the function confided to the particular agency, not the fact that Congress has been silent on the subject of removal. Under *Humphrey* and *Wiener,* we must make a sharp differentiation between those officials "who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."[23] Commissioners vested with significant quasi-judicial functions clearly come within the latter category. In the case of such commissioners, it cannot be inferred that Congress wished to hang over them the Damocles' sword of removal at will by the President simply because the statute does not expressly limit the presidential removal power.

The *Wiener* decision is of great practical consequence. Some

21 Id. at 628.

22 By the War Claims Act of 1948, 62 Stat. 1240, the Commission was set up "to receive and adjudicate according to law" claims for compensating internees, prisoners of war, and religious organizations who suffered personal injury or property damage at the hands of the enemy in World War II.

23 357 U.S. 349 at 353 (1958).

of the most important federal quasi-judicial agencies operate under statutes which say nothing about removal of their members.[24] Under *Wiener,* members of these agencies are given the same protection of security of tenure that the *Humphrey* case gave to commissioners of the FTC.

In deciding *Wiener's* case as it did, the high Court was, without a doubt, influenced by the disclosures concerning the operation of the federal regulatory commissions by the House Legislative Oversight Subcommittee, which occupied the nation's headlines during the months preceding the *Wiener* decision. As a direct response to the Legislative Oversight investigation, *Wiener* is of even greater moment than it might be otherwise. Adjudication free from executive influences and pressures is impossible where the adjudicator does not have security of tenure. "For it is quite evident," as the Court aptly pointed out in the *Humphrey* case, "that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."[25] The *Wiener* decision makes it possible for commissioners to resist White House pressures to an extent that could hardly be expected in officials who serve only during the President's pleasure.

Citizenship

Among the most significant of the past term's decisions are those dealing with various aspects of citizenship. In the first place, there is the right of a citizen to a passport, which was at issue in *Kent v. Dulles.*[26] Petitioners there had been denied passports because they had refused to submit non-Communist affidavits. The denials were based upon regulations promulgated by the Secretary of State denying passports to Communists, to persons who engage in activities which support the Communist movement, and to persons as to whom evidence showed that they were going abroad to further the Communist movement. Petitioners claimed that these regulations were unconstitutional both because the Secretary of State could not be given authority to

24 These include the Federal Communications Commission, Federal Power Commission, and Securities and Exchange Commission.

25 295 U.S. 602 at 629 (1935).

26 357 U.S. 116 (1958).

withhold passports because of their political beliefs or associations and because of an alleged denial of procedural due process.[27]

The Court, by a bare majority, held that the Secretary of State could not deny petitioners their passports. But it did so without reaching the important constitutional issues that had been argued. According to Justice Douglas, the Congress had nowhere delegated to the Secretary of State the authority to refuse passports to those engaged in Communist activities. The right to travel, the Court categorically declared, is part of the "liberty" protected by the due process clause. Since a constitutional right is thus involved, the Court will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it. "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."[28] The Congress did, it is true, enact a law in 1952[29] providing that, upon proclamation by the President, it shall be unlawful for any citizen to depart from or enter this country without a valid passport. In the Court's view, however, this provision did not at all give to the Secretary of State any discretion to withhold a passport under the circumstances of this case.

The *Kent* decision marks a sharp break with pre-existing law. There is in the first place the question of whether the courts should review the denial of a passport at all. Until recently, it was generally assumed that a passport was a mere privilege on which the government had the final word. *Kent* clearly relegates this view to jurisprudential limbo. Under *Kent,* a passport is a right of citizenship. This means that it cannot be denied without a fair hearing and that its denial is subject to judicial review.[30] The holding thus far is important, but far from earth-shaking, since it had already been anticipated by several important lower court decisions.[31]

The same cannot be said of the Court's holding that the Sec-

27 The due process claim was the main issue in the companion case of Dayton v. Dulles, 357 U.S. 144 (1958).

28 357 U.S. 116 at 129 (1958).

29 66 Stat. 190, 8 U.S.C. (Supp. V, 1958) §1185.

30 A comparable decision is Harmon v. Brucker, 355 U.S. 579 (1958), where judicial review was held available for the first time over an army discharge.

31 Starting in 1952 with Bauer v. Acheson, (D.C. D.C. 1952) 106 F. Supp. 445.

retary of State has no authority to deny a passport to a Communist or one going abroad to promote Communist causes. All of the authority prior to the Court's decision had been to the effect that the issuance of passports was a wholly discretionary act on the part of the Secretary of State. Since foreign affairs were involved, it has been assumed that the executive has had inherent controlling authority in this field. This assumption has been completely upset by the *Kent* case. According to the majority opinion, the diplomatic function of the passport is subordinate. The right to travel abroad is primarily a personal right included within the "liberty" protected by due process. "If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."[32] There is, in other words, no power in the Secretary of State to deny passports other than that expressly conferred upon him by statute. Since there was no express delegation by Congress to the Secretary of State of the power to deny passports to Communists, no such power exists in him.

The main trouble with the Court's all-too-simple reasoning is that it strikes down still another of the government's essential tools to deal with what all three branches of our government have determined to be a conspiracy to undermine and overthrow our system. In its place is left only a power vacuum in the passport field which will probably be corrected by the next Congress, but which may do great damage to national security in the interim. Few will deny that the old law on passports had become outmoded. At the same time, one may wonder whether it had to be completely cast aside by the Court's either-or approach. It would have been preferable for authority in this area to be recognized in the executive, while at the same time emphasizing the judicial safeguard against arbitrary action in particular cases.[33]

In *Perez v. Brownell*[34] and *Trop v. Dulles*[35] the basic issue was that of loss of citizenship. *Perez* involved the constitutionality of section 401(e) of the Nationality Act of 1940.[36] Under it, a United States citizen (whether by birth or naturalization) loses his citizenship by voting in a political election in a foreign state. Perez,

32 357 U.S. 116 at 129 (1958).

33 E.g., by requiring a fair hearing, requiring the Secretary's findings to be based on rational evidence, barring secret evidence, and the like.

34 356 U.S. 44 (1958).

35 356 U.S. 86 (1958).

36 54 Stat. 1137 (1940), 8 U.S.C. (1952) §1481.

a native of Texas, had voted in a Mexican election in 1946 and was declared to have lost his citizenship by operation of the 1940 act. The Court, five to four, held that, as applied to Perez, the statute was valid. The power of Congress to deal with foreign relations, said the majority opinion, may reasonably be deemed to include a power to deal with the active participation of American citizens in foreign political elections. And the means used by Congress here (withdrawal of citizenship) was, in the majority's view, one reasonably calculated to effect an end within Congress' power to achieve—namely, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign elections.

In *Trop,* too, the basic issue was whether a forfeiture of citizenship comported with the Constitution. In this case, too, the loss of citizenship resulted from a provision of the Nationality Act of 1940, this time section 401(g), which states that a citizen loses his citizenship by deserting the military or naval forces in time of war, where he is convicted of such desertion by court martial and, as the result of such conviction, is dishonorably discharged. In 1944, Trop had escaped from a stockade in Casablanca where he had been confined for a previous breach of discipline. He was picked up by the military police the very next day and then convicted by a court martial of desertion and sentenced to three years at hard labor and a dishonorable discharge. In 1952, Trop's application for a passport was denied on the ground that, under section 401(g) of the Nationality Act, he had lost his citizenship by his conviction and discharge for wartime desertion. As in the *Perez* case, the Court divided five to four. In *Trop,* however, the Nationality Act provision at issue was found to be beyond the powers of the Congress. In the Court's view, denationalization may not be inflicted as a punishment for desertion, even in time of war. Section 401(g) is a penal law and, even though the power of Congress may be assumed to extend to divestment of citizenship, denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment.

The observer who compares the *Perez* and *Trop* decisions is bound to be taken aback at the differences in result. The Congress could, under *Perez,* take away the citizenship of a man who committed the more or less venial act of voting in a foreign election. But, under *Trop,* it could not denationalize a soldier who refused to perform the ultimate duty of citizenship by deserting in

time of war. If loss of citizenship may be made the consequence of such harmless conduct as voting in a foreign election, it seems incongruous, to say the least, that such loss should be unconstitutional when it is imposed by Congress as the consequence of conduct that is a serious crime.

In actuality, the difference in result as between *Perez* and *Trop* is to be explained by a shift in vote of one member of the Court—Justice Brennan. Aside from him, the other justices are consistent in the results for which they vote. The other justices who make up the bare majority in *Perez*[37] are the four dissenters in *Trop,* with Justice Frankfurter writing both the majority opinion in *Perez* and the dissent in *Trop.* The justices whom Brennan joins in *Trop*[38] are the four dissenters in *Perez,* with the opinion of the Court in *Trop* and the principal dissent in *Perez* both being written by Chief Justice Warren.

On the face of it, it is the justices other than Brennan who follow the only possible consistent approach. If Congress can take away citizenship for what Perez did, it should be able to do the same for what Trop did, and vice versa. Indeed, if anything, Trop's act was by far the more serious, so far as its repudiation of the duties of citizenship was concerned.[39] To hold that Congress cannot withdraw citizenship for violation of one of the highest duties of citizenship, but can do so in the case of an act like that of Perez is to turn constitutional law bottom-side up.

"They talk," said John Selden in his *Table Talk,* "(but blasphemously enough) that the Holy Ghost is president of their General Councils; when the truth is the odd man is still the Holy Ghost."[40] How are we to explain the vagaries of the "odd man" Brennan in the *Perez* and *Trop* cases?

Justice Brennan himself has written a concurring opinion in *Trop* which seeks to justify his switch in votes. In *Perez,* says he, the action of Congress is justified by its power over foreign affairs. In *Trop,* on the other hand, the legislative power used was the war power. Desertion, he concedes, can be dealt with under Congress' power to maintain armies. But is expatriation a means rea-

37 Justices Frankfurter, Burton, Clark, and Harlan.

38 Warren, C.J., and Justices Black, Douglas, and Whittaker.

39 Voting in a foreign election, it should be noted, may be open to aliens under the law of the particular foreign state, as it was in presidential elections in this country until 1928. See 356 U.S. 44 at 84-85 (1958).

40 SELDEN, TABLE TALK, Pollock ed., 38 (1927).

sonably calculated to deal with the evil of desertion? He answers this question in the negative, asserting that expatriation is a penal device which has no rational relation to the ends purported to be served by expatriation.

The present writer has read and reread Justice Brennan's explanation and it may be because of his own obtuseness but he must conclude, as once did Justice Jackson in a noted dissent, "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.' "[41] Of course, *Trop* rests on the war power, not on that to regulate foreign affairs. Yet, if there is a difference in degree between the two powers, surely the greater in scope is the war power—the most far-reaching in the whole catalogue of governmental powers.

The notion that the Nationality Act provision imposing loss of citizenship is a penal law is wholly out of line with perhaps the oldest line of cases in our constitutional law.[42] Chief Justice Warren, it should be noted, goes even further in his majority *Trop* opinion on this point than Justice Brennan does in his concurrence. According to the Chief Justice, loss of citizenship as punishment for desertion is barred as cruel and unusual punishment under the Eighth Amendment. This is stretching constitutional doctrine beyond the breaking point. "It seems scarcely arguable," in the words of Justice Frankfurter's wry comment in his *Trop* dissent, "that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"[43]

It is most difficult to see (even assuming that we were to accept the assumption that the provision at issue in *Trop* is a penal law) how it can be said that the sanction of expatriation has no rational relation to the problem of desertion. Surely Congress may justifiably be of the opinion that stern measures are needed in order to control evasions of military duty in wartime. As Justice Frankfurter puts it, "It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency

41 SEC v. Chenery Corp., 332 U.S. 194 at 214 (1947).
42 Starting with Calder v. Bull, 3 Dall. (3 U.S.) 386 (1798).
43 356 U.S. 86 at 125 (1958).

of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens."[44]

Loyalty Cases

Few problems presented to the Supreme Court in recent years have been more difficult than those arising from the restrictive measures taken by government in this country to deal with the "cold war." To reconcile these measures with the demands of the Bill of Rights has been far from an easy task. On the one hand, there has been the need to deal effectively with the threat posed by world communism; on the other, the fundamental position in our system of the freedoms safeguarded by the First Amendment. If the high tribunal has relied upon technicalities and distinctions in this area which seem nice, it is because "nice distinctions are to be expected."[45] Hard cases, according to the old legal saw, make bad law. What is not generally realized is that cases decided under severe stress may make equally bad law.

Governmental response to the cold war has had its greatest impact in the various loyalty programs administered by both federal and state governments. Different aspects of these programs have come before the highest Court in a number of recent cases. It is safe to say that the decisions rendered in these cases have wholly pleased few people. Critics of the loyalty programs have been disturbed by the Court's undue timidity in fitting the loyalty procedures into the mold of due process.[46] Supporters of the programs have condemned what they assert to be the unwarranted restriction of the scope of the basic loyalty program of the federal government.[47] And even those who have agreed with the results in particular cases have been far from satisfied with the inadequate reasoning in most of the Court's opinions.

Until this past term, the loyalty decisions have fallen into two patterns. In the first cases, the Court uniformly upheld governmental action in this area;[48] in the cases starting with *Wieman v.*

44 Id. at 122.

45 Frankfurter, J., in Detroit v. Murray Corp., 355 U.S. 489 at 505 (1958).

46 Bailey v. Richardson, 341 U.S. 918 (1951); Peters v. Hobby, 349 U.S. 331 (1955). See SCHWARTZ, THE SUPREME COURT 323-328 (1957).

47 Cole v. Young, 351 U.S. 536 (1956).

48 American Communications Assn. v. Douds, 339 U.S. 382 (1950); Garner v. Los Angeles Board, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Bailey v. Richardson, 341 U.S. 918 (1951).

Updegraff, the results have favored the individuals involved.[49] During the 1957 term, state action was upheld again in two five-to-four decisions. But, once again, the reasoning of the Court appears far from adequate.

The facts of the two cases can be stated briefly. In *Lerner v. Casey,*[50] a subway conductor in the New York City Transit System was dismissed under the state's Security Risk Law, on the ground that he had been disclosed to be of doubtful reliability by his failure to answer questions concerning present membership in the Communist Party put to him in the course of an investigation conducted by the New York City Commissioner of Investigation. Petitioner's refusal to answer was based upon his Fifth Amendment privilege against self-incrimination. In *Beilan v. Board of Education,*[51] a Philadelphia public school teacher was dismissed on the ground of "incompetency" because he had refused to answer questions put to him by the Superintendent of Schools concerning his Communist Party affiliations. A year after his refusal to answer the superintendent, petitioner asserted the privilege against self-incrimination at a hearing of the House Committee on Un-American Activities, and it was then that petitioner was suspended and the formal charges preferred that led to his dismissal.

The Court upheld the dismissals of petitioners in both cases. In *Lerner,* the opinion states, the relevant authorities could justifiably base a finding of doubtful trust and reliability on petitioner's lack of frankness, just as if he had refused to give any other information about himself which might be relevant to his employment. Nor did it make any difference here that petitioner had asserted his Fifth Amendment privilege in refusing to answer. The federal privilege against self-incrimination was not available through the Fourteenth Amendment in this non-federal investigation. In addition, his discharge was not based upon the fact that he had asserted Fifth Amendment rights, but upon his lack of candor to his governmental employer, upon which a finding of doubtful trust and reliability could rationally be based. The reasoning in *Beilan* was basically similar. There, too, the state could

49 Wieman v. Updegraff, 344 U.S. 183 (1952); Peters v. Hobby, 349 U.S. 331 (1955); Cole v. Young, 351 U.S. 536 (1956); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Konigsberg v. State Bar, 353 U.S. 252 (1957).

50 357 U.S. 468 (1958).

51 357 U.S. 399 (1958).

base a finding of "incompetency"[52] on his refusal to answer questions relevant to his fitness and suitability to serve as a teacher.

The opinions in both cases are based upon the patent fiction that these are anything but loyalty cases. The Court's reasoning wholly rejects the view that "Because the specific questions put to these employees were part of a general inquiry relating to what is compendiously called subversion and to conduct that on due proof may amount to disloyalty, every part of the process of inquiry is given the attribute of an inquiry into disloyalty and every resulting severance from service is deemed a finding of disloyalty."[53] Yet, no matter how the Court may seek to ignore it, were not both petitioners' dismissals essentially disloyalty discharges? A tribunal would indeed have to be that "blind" court, against which Chief Justice Taft once admonished, that does not see what "all others can see and understand"[54] to ignore the stigma of disloyalty attached in practice to a discharge based upon a refusal to answer questions concerning communist membership or affiliations.

The Court's failure to rely upon realities is especially apparent in the *Beilan* case. According to the majority opinion, Beilan was discharged for "incompetency" solely because of his refusal to answer his superior's questions concerning his communist affiliations. The facts do not support this view. The questions had been asked by the school superintendent during June and October 1952. Almost fourteen months elapsed before Beilan was suspended and the charges preferred which led to his dismissal. The record is clear (as Justice Brennan points out in dissent[55]) that the dismissal proceedings were actually initiated because Beilan asserted his Fifth Amendment privilege before the Committee on Un-American Activities on November 18, 1953. It was only seven days later (on November 25, 1953) that the dismissal proceedings were instituted. Under these facts, it is hard to see why *Beilan's* case is not governed by the Court's 1956 *Slochower* decision.[56] To decide, as the Court does, that Beilan's dismissal bore no relation to his action before the congressional committee is for it to ignore the realities of the record in the case.

[52] This term, it should be noted, has been construed broadly by the Pennsylvania courts so as to include insubordination and lack of candor. See id. at 402.

[53] Frankfurter, J., concurring, id. at 410.

[54] United States v. Rumely, 345 U.S. 41 at 44 (1953).

[55] 357 U.S. 399 at 417 (1958).

[56] Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

An aspect of the loyalty programs that has greatly disturbed many observers has been their pervasiveness in our system. Their reach has not been limited to government employees. They have been extended also to certain areas of private industry[57] and to various other fields such as labor relations,[58] public housing, unemployment insurance,[59] and even the right to run for public office.[60] Under the different loyalty programs, we have had a widespread revival of the "test oath" technique in our system.[61]

Under a provision of the California Constitution adopted in 1952, no person or organization which advocates the overthrow of government by force or violence or the support of a foreign government against the United States in time of hostilities shall receive any tax exemption. To effectuate this provision, a statute was enacted which requires a claimant, as a prerequisite to qualification for any property-tax exemption, to sign a declaration on his tax return that he does not engage in the activities described in the constitutional provision. In *Speiser v. Randall*[62] and a companion case,[63] the California provisions were attacked by veterans who claimed a veteran's property-tax exemption provided by California law and by a church which claimed the exemption for property used for religious worship.

The Court, with only Justice Clark dissenting, held the California tax oath invalid. But it did so without reaching the merits of the question of whether the state could impose such a test oath as a condition for securing tax exemption. Instead, the Court assumed without deciding that California could deny tax exemptions to persons who engage in illegal advocacy. This approach did not render the California laws valid, for the Court found that their enforcement was tainted by a basic procedural infirmity. The principal feature of the California procedure was that, under it, taxpayers who claim exemption have the affirmative burden to show that they qualify for the exemption. As the Court interpreted it, not only does the initial burden of bringing proof of nonadvocacy rest on the taxpayer, but throughout the entire pro-

57 For the invalidation of such an extension, see Parker v. Lester, (9th Cir. 1955) 227 F. (2d) 708.

58 American Communications Assn. v. Douds, 339 U.S. 382 (1950).

59 See Black, J., concurring, in Speiser v. Randall, 357 U.S. 513 at 531 (1958).

60 Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

61 See SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 272 (1955).

62 357 U.S. 513 (1958).

63 First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958).

ceedings (both before the tax assessor and in the courts on review) the burden lies on the taxpayer to persuade the assessor, or the court, that he falls outside the class denied the exemption. According to the Court, this allocation of the burden of proof fell short of the requirements of due process.

With all respect, it is hard to agree with the manner in which the Court decided the *Speiser* case. It is, of course, true that the California tax oath presented a most difficult and delicate constitutional question, and true also that the high tribunal should avoid the resolution of such questions whenever possible. Yet that hardly justifies the seizing of any issue (even though its substance be of straw) to enable the constitutional question to be avoided. The Court's interpretation of the California procedure is, to say the least, strained. A basically similar oath under the Taft-Hartley Act was construed only two years ago as being conclusive in character.[64] Here, the oath is treated as being only introductory, not conclusive, in nature. Yet, even if that interpretation is sound, it does not justify the result drawn from it. To require the state to bear the burden of proof in this type of proceeding is wholly novel doctrine. Except perhaps in a criminal proceeding, the state should be able to regulate the incidents of procedure, including that of the burden of proof. The cases cited the other way are all criminal cases, and, whatever the impact on those concerned, this is surely not such a case. The Court's assumption that this case should be governed by the criminal principles is not supported by reason or authority.[65] The ordinary tax assessment procedures here (including the normal burden on the taxpayer to show he comes within an exemption) should be adequate so far as due process is concerned.

Federal-State Relations

Observers of our highest Court in operation have often noted the relationship between its jurisprudence and public opinion. Mr. Dooley notwithstanding, of course, that relationship cannot be as direct in the case of the Court as it is where the work of the political departments of government is concerned. But it can hardly be denied that, by and large, the justices are influenced by the common sentiment of the community.

[64] Leedom v. Intl. Union, 352 U.S. 145 (1956).

[65] It is contrary to the spirit of Ullmann v. United States, 350 U.S. 422 (1956), and deportation cases like Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

During the past term, the response of the high Court to public opinion can be seen clearly in the cases involving the relations between federal and state power. Few decisions in recent years have called forth stronger criticisms than those which the Court has rendered in this field. All too many observers have seen these decisions to be based upon a needless disregard of the legitimate rights of the states. It has been the Court's action in restricting state power, indeed, that has, as much as any factor, been responsible for the strong sentiment in the 85th Congress to curb the Court's authority.

The severe criticism of the Court's recent work in the field of federalism appears definitely to have had its effect. If, in prior terms, the basic theme was that of restriction of state authority, during 1958, the pendulum started to swing the other way.

Many of the controversial recent decisions in this field involved state action regulating labor relations. Culminating in the 1957 *Guss* case,[66] the decisions referred to invalidated state action even though the states were dealing with aspects of their labor relations which were not regulated by the National Labor Relations Act. In *International Association of Machinists v. Gonzales*,[67] on the other hand, the Court sustained a state-court damage award against a union for conduct that was subject to an unfair labor practice proceeding under the federal labor statute.

Plaintiff in *Gonzales* brought an action in a state court against the machinists' union for an alleged breach of contract in his expulsion from the union. He sought restoration of his membership and damages. The majority of the Court upheld the power of the state court to grant judgment for plaintiff. This was true even though the union's acts might well have amounted to an unfair labor practice over which the National Labor Relations Board had jurisdiction.

The dissenting opinion of the Chief Justice would appear correct in its contention that the decision is contrary to the recent cases invalidating state action on the ground of federal pre-emption of the field of labor relations. The majority emphasizes the fact that, in this case, the NLRB could not have given plaintiff the relief that the state gave him according to its local law of contracts and damages. The possibility of partial relief from the

66 Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).
67 356 U.S. 617 (1958).

NLRB, said Justice Frankfurter, does not, in a case like this, deprive a party of available state remedies for all damages suffered.

In the view of the dissent, the state has no power in this area, whether or not like relief can be awarded by the NLRB. As the dissenting opinion puts it, "Even if we assume that the Board had no authority to award respondent back pay in the circumstances of this case, the existence of such a gap in the remedial scheme of federal legislation is no license for the States to fashion correctives."[68] This view is clearly correct if the prior decisions (notably the *Guss* case) were to be the sole touchstone of decision here. But the whole point about *Gonzales* is that it represents a repudiation, at least in part, of cases like *Guss*. Referring to the 1953 *Garner* decision[69] (the starting point, in many ways, of the decisions invalidating state authority), Justice Frankfurter declares that it undoubtedly carries implications of exclusive federal authority. But, he goes on to say, "the other half of what was pronounced in Garner—that the [federal] Act 'leaves much to the states'—is no less important."[70] This "other half" had come to be all but completely overlooked in the post-*Garner* cases. *Gonzales* is important precisely because it places renewed emphasis upon it. Henceforth, it may be hoped, the Court will be much more hesitant to infer an inflexible congressional intent to sweep the boards of the states' pre-existing power to deal with labor matters, even where the NLRB cannot grant complete relief.

The past term's decisions also recognize an extension of state authority in the field of so-called intergovernmental tax immunities. This field is one that is vital to the proper functioning of a federal system such as ours. It grows out of the possession by both the federal government and the states of powers of taxation. "Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations."[71]

Although reciprocal immunity from taxation of both the

[68] Warren, C.J., dissenting, in the companion case of Intl. Union v. Russell, 356 U.S. 634 at 650 (1958).

[69] Garner v. Teamsters Union, 346 U.S. 485 (1953).

[70] 356 U.S. 617 at 619 (1958).

[71] Frankfurter, J., concurring, in Graves v. New York ex rel. O'Keefe, 306 U.S. 466 at 488 (1939).

states and the federal government is essential, it must not be pushed too far. It is one thing to say that instrumentalities of the federal government themselves must not be subject to state taxation. It is quite another to create what amounts to a vast area of private immunities for all those who deal with the government. The immunity of the federal government itself should not be used to defeat the right of the states to impose nondiscriminatory taxes on private business activities within their borders, even if such activities are carried on with the government.

In several 1958 cases, the high Court has given effect to these considerations. In *Detroit v. Murray Corp.*,[72] Murray was acting as a subcontractor under a prime contract for the manufacture of airplane parts between two other companies and the United States. Under the relevant contract, Murray received partial payments as it performed its obligations. Title to all parts, materials, and work in process acquired by Murray in performance of the subcontract vested in the United States upon any such partial payment, even though Murray retained possession. The City of Detroit assessed a tax against Murray which in part was based on the value of materials and work in process in its possession to which the United States held legal title under the title-vesting provisions of the subcontract.

The Court, by a bare majority, upheld the tax as against the contention that it violated the federal government's tax immunity. In the Court's view, this was essentially a tax on the possession by a private person of property which he uses for his own private ends. "Lawful possession of property," declared Justice Black, "is a valuable right when the possessor can use it for his own personal benefit."[73] It must be conceded that the tax here went to the very boundary of state power, for title to the property involved did, under the contract, vest in the United States. But such title does not change the essential nature of the tax as one on a private person using the property for purposes of private profit. The form of the particular contract should not defeat the state's taxing power and vest in a government contractor immunity from taxes which his competitors must pay. It is true that, in 1954, in the *Kern Limerick* case,[74] the Court did give liberal effect to a comparable contractual provision. The *Murray*

72 355 U.S. 489 (1958).
73 Id. at 493.
74 Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).

result is more consistent with the need to prevent undue extension of the immunity doctrine. The legitimate powers of the states should not be defeated by an artificial line drawn by government contracting officers.

United States v. Detroit[75] presented another aspect of the immunity problem. At issue in it was a Michigan law which provides that, when tax-exempt real property is used by a private party in a business conducted for profit, the private party is subject to taxation to the same extent as though he owned the property. A tax was assessed under this law against a corporation which had leased an industrial plant owned by the United States in Detroit. The plant was leased at a stipulated annual rental for use in the lessee's private manufacturing business. The lease provided that the lessee could deduct from the agreed rental any taxes paid by it on the property.

The Court, in upholding the Michigan tax, followed the same basic approach as that in the *Murray* case. Here, too, the tax is treated as one on a private person for the use of property (which happens to be owned by the government). In taxing the use of property, the state taxes an interest of the private taxpayer, not of the federal government. Nor does it change the result that the government will not be able to secure as high rentals if its lessees are taxed. The whole thrust of the recent cases on immunity is a rejection of the notion that a state tax is vitiated because it involves the imposition of an increased financial burden on the government. The test today, which both the *Murray* and *Detroit* cases confirm, is not whether the government may have to bear the cost of a tax which a state imposes on a third person who has business relations with the government. Even in such a case, the state tax should be valid where the state could clearly impose such a tax upon such a third person but for the fact that the transaction which gave rise to it was not with a private person but with the government.[76]

Criminal Law

More and more, in recent years, the Supreme Court has been engaged in reviewing the validity of state criminal convictions.

[75] 355 U.S. 466 (1958).

[76] Compare Frankfurter, J., dissenting, in United States v. Allegheny County, 322 U.S. 174 at 196 (1944). The Court's extension of state power in these cases does not go so far as to uphold direct state regulation of the transportation of federal property. Public Utilities Comm. v. United States, 355 U.S. 534 (1958).

The decisions of the high tribunal in this field are closely related to those just discussed on conflicts between federal and state power. Here, too, the Court's decisions have a direct impact upon the proper functioning of our federalism.

It should not be forgotten that the state courts are coordinate tribunals whose independence must be respected. As Justice Frankfurter put it a decade ago, "intervention by this Court in the criminal process of States is delicate business."[77] The Supreme Court is not a court of criminal appeal from the states. It must not use the Constitution as a ready instrument to expand federal (and incidentally its own) authority over the state courts.

In these criminal cases, the high bench's function is essentially that of ensuring that the state courts have complied with the demands of procedural due process. As it has been interpreted by the Court in many cases, the due process clause safeguards those procedural rights which may fairly be deemed fundamental in our system of ordered liberty.[78] When such rights are violated by particular state procedures, the Supreme Court must intervene.

A court which interprets the due process clause in this way will not hesitate to void convictions based upon coerced confessions. "The Due Process Clause," said the Court in 1949, "bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure."[79]

How does the highest Court determine whether a confession used to secure a state conviction was actually the result of compulsion? In the 1944 *Ashcraft* case,[80] the Court held that, where the confession had been secured under circumstances that were "inherently coercive," the conviction had to be reversed, even though actual coercion could not be proved. In the 1957 *Fikes* case[81] the Chief Justice emphasized that the "totality of the circumstances" that preceded the confession had to be scrutinized.

In *Payne v. Arkansas,*[82] the Court held that both the *Ashcraft* and *Fikes* tests were met. Petitioner in *Payne* was a mentally dull 19-year-old Negro, who had been (1) arrested in a southern

77 Dissenting, in Uveges v. Pennsylvania, 335 U.S. 437 at 449 (1949).
78 See SCHWARTZ, THE SUPREME COURT 167-168 (1957).
79 Watts v. Indiana, 338 U.S. 49 at 55 (1949).
80 Ashcraft v. Tennessee, 322 U.S. 143 (1944).
81 Fikes v. Alabama, 352 U.S. 191 (1957).
82 356 U.S. 560 (1958).

state without a warrant, (2) denied a hearing before a magistrate, (3) held incommunicado three days, (4) denied food for long periods, and (5) told by the police chief "that there would be thirty or forty people there in a few minutes that wanted to get him." The confession of murder followed immediately after this threat of mob violence. In these circumstances, it is difficult to see how the Court could conclude that the confession was other than coerced. "It seems obvious," said Justice Whittaker, "from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice.' "[83]

It is relatively rare for a case as clear as *Payne* to be presented to the highest Court. Several other decisions involving confessions are more debatable. *Thomas v. Arizona*[84] arose out of a confession made by a 27-year-old Negro, with a partial high-school education. After his arrest, he had been lassoed twice by ranchers, the implication being that a lynching was desired. On both occasions, the sheriff quickly intervened, removed the rope, and admonished, "Stop that. We will have none of that." The confession came the next day, after petitioner had been taken to the county jail and before a justice court for preliminary examination. There was no indication that petitioner had in any way been mistreated after the roping incidents.

By a bare majority, the Court upheld the use of the confession. The 20-hour interval between the time of the ropings and the confession was devoid of any coercion. "Deplorable as these ropings are to the spirit of a civilized administration of justice," said Justice Clark, "the undisputed facts before us do not show that petitioner's oral statement was a product of fear engendered by them."[85] The Court must, in other words, look to the "totality of circumstances" in the case, not to the mere fact that coercive pressure may, at one point, have been used. To the Court majority, the ropings a day before the confession did not engender a fear that overbore petitioner's will, where he was well treated during the intervening period. One wonders, however, whether, bearing in mind the practical realities of the situation, a Negro like petitioner could be said not to have continued in fear after a rope had been placed around his neck. After the ropings, the

[83] Id. at 567.
[84] 356 U.S. 390 (1958).
[85] Id. at 400.

threat of a lynching must have been ever-present in petitioner's mind. Actual ropings, of the type involved here, would seem by their very nature to fall within the "inherently coercive" test of the *Ashcraft* case.

Even more difficult to resolve was a case involving confessions made after denial by the police of requests by defendants to contact their attorneys. In *Crooker v. California,*[86] petitioner had asked for an opportunity to call a lawyer after he was arrested. Petitioner claimed that even if his confession made thereafter while in custody was in fact voluntary, its use violated due process because it was obtained after the denial of his request to contact his attorney.

Since, so far as the facts showed, Crooker's confession was voluntary, his claim really was that any confession made after his due process right to counsel was violated was itself barred by the due process clause. The Court, however, in another five-to-four decision, held that, in the circumstances of this case, there was no constitutional right to counsel. Whether there is a Fourteenth-Amendment right to counsel, said the Court, depends upon whether the deprivation of counsel so prejudices petitioner that there is "an absence of 'that fundamental fairness essential to the very concept of justice.' "[87] And this determination depends upon all the circumstances of the case. Crooker was a college-educated man (who even had some law-school training) and was well aware of his rights including that to keep silent. On these facts, there was no denial of fundamental fairness and hence no violation of due process.

What the Court in *Crooker* was doing was to apply the so-called "fair trial" test of *Betts v. Brady.*[88] Under it, there is a due-process right to counsel in a state case only if the accused cannot obtain a "fair trial" without the aid of counsel. The only difficulty with applying this approach in *Crooker* is that *Crooker* was a capital case and *Betts v. Brady* has been thought to apply only to non-capital cases. Under the famous *Scottsboro* case,[89] it has been assumed that there is an absolute right to counsel in a capital case. As Justice Douglas points out in his dissent, "The rule of *Betts* v. *Brady,* which never applied to a capital case . . . is now

86 357 U.S. 433 (1958).
87 Id. at 439.
88 316 U.S. 455 (1942).
89 Powell v. Alabama, 287 U.S. 45 (1932).

made to do so. Assuming that *Betts* v. *Brady* was properly decided, there is no basis in reason for extending it to the denial of a request for counsel when the accused is arrested on a capital charge."[90]

At the very outset of this section, the present writer made clear his personal predilection in favor of a restricted Supreme Court role in reviewing state decisions. Respect for coordinate tribunals requires the high bench to lean over backwards in these cases. But this is not to say that the Court must invariably uphold state convictions. Due process does draw a line of fundamental fairness which cannot be crossed by the states. In this area, as in others in our public law, judicial abnegation and judicial abdication are two entirely different things.

The above observations were called forth by *Hoag v. New Jersey*.[91] A local grand jury had returned an indictment against petitioner charging him with robbing three individuals in a tavern. The state called five witnesses at the trial: the three victims named in the indictment and two other persons, Dottino and Yager. The latter two were also victims of the robbery, but had not been named in the indictment. Petitioner testified to an alibi. Only one of the state's witnesses, Yager, positively identified petitioner as one of the robbers. The jury then acquitted petitioner. Immediately thereafter, the grand jury returned another indictment against petitioner, which was the same as the earlier one except that it named Yager as the victim of the robbery. At the trial on this indictment, the state called only Yager as a witness and he repeated his earlier testimony. Petitioner repeated his alibi. This time the jury returned a verdict of guilty.

According to the Court majority, petitioner here was not put in jeopardy twice for the same crime. Each of the four robberies, though taking place on the same occasion, was a separate offense. "We do not think," said Justice Harlan, "that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence."[92]

The Court's approach here is a good illustration of the sacrifice of substance to form. The procedure followed by the state did relitigate exactly the same issue on the same evidence before two

90 357 U.S. 433 at 443 (1958).
91 356 U.S. 464 (1958).
92 Id. at 467.

different juries with a man's innocence or guilt at stake. Whether due process is violated in a particular case depends upon whether the state procedure is shocking or repulsive (or, to paraphrase a characteristic more earthy contention of Justice Holmes, "if it makes you vomit").[93] For the state to use the technical form of a separate indictment to retry petitioner after it has failed to secure a conviction should meet this test. In the Anglo-American system, at least, the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for substantially the same offense.

In some ways, the most important act of the high Court in the field of criminal law was its repudiation of the rule announced in the 1953 *Stein* case.[94] The Court there stated that, even where a coerced confession had been admitted, the state jury could still have returned a conviction if there was other evidence before them sufficient to convict. In other words, under *Stein,* it is not enough for a defendant to show that he was deprived of a constitutional right; he must also prove that, if his right had not been violated, there would not be enough evidence left to authorize the jury to find guilt.

The *Stein* ruling is heresy wholly contrary to the basic thrust of our constitutional law. A constitutional right is not a rule of evidence, to be governed by the harmless error rule. The denial of such a right should not be treated as a matter of mere error, which may be disregarded if deemed harmless. The Court itself has recognized this in its already-discussed *Payne* opinion. The state there argued that, even apart from the confession (which the Court found to be coerced), there was adequate evidence before the jury to sustain the conviction. But, said the Court, no one can say what credit and weight the jury gave to the confession. "Even though there may have been sufficient evidence," declares Justice Whittaker, directly contrary to *Stein,* "apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause."[95]

Discussion of the past term's criminal-law decisions should include several cases which deal directly with problems posed by

93 See SCHWARTZ, THE SUPREME COURT 168 (1957).
94 Stein v. New York, 346 U.S. 156 (1953).
95 356 U.S. 560 at 568 (1958).

the existence of the federal system. In *United States v. Sharpnack*[96] the issue was the constitutionality of the Assimilative Crimes Act of 1948.[97] It sought to deal with the problems arising from the existence of federal enclaves within the states. The basic congressional intent with regard to such islands of federal jurisdiction has been that of conformity to local law: the federal offenses in each enclave were to be identical with those proscribed by the state in which the enclave was situated. In accordance with such intent, the act at issue provided that any person within a federal enclave who is guilty of any act or omission which (although not made punishable by any federal statute) would be punishable under the law of the state where the enclave is located, shall be guilty of a like offense and subject to like punishment. Aside from the ghost of the doctrine that the Congress may not delegate legislative power to the states (which the Court speedily laid to rest), there is no valid reason why Congress cannot conform its criminal law to that of the states. The Court had little difficulty therefore in upholding the Assimilative Crimes Act.

Benanti v. United States[98] also arose because of the existence of separate systems of criminal law, enforced by separate sets of law enforcement officers. Under the Supreme Court's interpretation of the due process clause, the states are not held to the strict standards governing illegally secured evidence which bind the federal courts.[99] The fact that a state conviction is based upon illegally secured evidence will not lead to reversal by the highest Court unless the method used to obtain the evidence was so shocking as to offend due process.[100] In the federal courts, on the contrary, evidence obtained illegally is wholly inadmissible.

In *Benanti* the question was whether evidence obtained as the result of wiretapping by a state law enforcement officer, without participation by federal authorities, was admissible in a federal criminal trial. The evidence was obtained pursuant to a warrant secured by the New York police, in accordance with the relevant state law, authorizing them to tap certain wires. The Court had already held that evidence obtained from wiretapping by federal agents was inadmissible in a federal court;[101] while the same type

96 355 U.S. 286 (1958).
97 18 U.S.C. (1952) §13.
98 355 U.S. 96 (1957).
99 Under Wolf v. Colorado, 338 U.S. 25 (1949).
100 As was the case in Rochin v. California, 342 U.S. 165 (1952).
101 Nardone v. United States, 308 U.S. 338 (1939), 302 U.S. 379 (1937).

of evidence was held admissible in a state court where it had been obtained by state agents.[102] *Benanti,* involving the interplay of the state and federal criminal law systems, forced a choice between the results of these cases.

The Court, in a unanimous opinion, held that the wiretap evidence at issue was inadmissible. The Federal Communications Act[103] expressly prohibits all wiretapping. According to the Chief Justice, "the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and . . . evidence obtained in violation of this prohibition may not be used to secure a federal conviction."[104] Nor does it change the result that the instant wiretapping was done by state agents acting in accordance with an express provision of New York law. The Communications Act is a comprehensive scheme for the regulation of interstate communications. Congress, in setting out in that act a prohibition of wiretapping in express terms, did not mean to allow state legislation which would contradict that prohibition.

The most interesting aspect of the *Benanti* opinion is its clear implication that state police commit a federal violation whenever they engage in wiretapping even though the wiretapping is expressly permitted by a state law such as the New York statute involved in *Benanti.* Presumably, this will not affect the admissibility of such evidence in the state courts, since the Court has, as indicated, upheld state convictions based on illegally secured evidence. At the same time, it is anomalous, in a system grounded upon supposed respect for the law, for law enforcement officers to engage so widely in a practice clearly held illegal by all the justices.

Perhaps the most difficult of the cases involving the relationships between federal and state criminal law was *Knapp v. Schweitzer.*[105] Petitioner there had refused to answer certain questions before a New York grand jury on the ground that his answer might incriminate him. The grand jury then granted him immunity from prosecution under a New York statute. Petitioner still refused to answer and was convicted of contempt. The Supreme Court upheld this conviction, even though petitioner's

102 Schwartz v. Texas, 344 U.S. 199 (1952).
103 48 Stat. 1103 (1934), 47 U.S.C. (1952) §605.
104 355 U.S. 96 at 100 (1957).
105 357 U.S. 371 (1958).

testimony might have been used in a subsequent federal prosecution against which New York did not, of course, have any authority to grant immunity.

In the Court's view, any unfairness to the individual resulting from its decision is part of the price we pay for our federalism. The Fifth Amendment, which alone gives the petitioner the right against self-incrimination, is binding solely against the federal government. "It is plain," says Justice Frankfurter, "that the amendment can no more be thought of as restricting action by the States than as restricting the conduct of private individuals."[106] Under *Twining v. New Jersey*,[107] the right against self-incrimination is not, as such, included in the due process clause of the Fourteenth Amendment. All the same, however, the result in *Knapp* leaves one with an uneasy feeling. A witness like the instant petitioner who is ordered to testify under a law like the New York immunity statute may be placed in a desperate situation. If his testimony may incriminate him in a federal crime, he must either remain silent and risk state imprisonment for contempt or confess himself into a federal penitentiary. One may wonder, with a dissenting justice in *Knapp*,[108] whether such a state of affairs must be accepted as a necessary part of our federalism.

Strands and Patterns

In writing of the high Court, the present writer has compared it to a tapestry made up of many strands which, interwoven, make a pattern; to separate a single one and look at it alone not only destroys the whole but gives the strand itself a false value.[109] In the prior portions of this article we have been examining the single strands of individual decisions. But their real significance lies in their contribution to the weaving of the institutional pattern. It is to this pattern that this conclusion is devoted. Here we are dealing, not so much with individual decisions, as with the Court itself as an institution during the past term.

It does not require the acumen of one for whom the *United States Reports* constitute his staple reading to realize that there is something drastically amiss in our highest judicial institution. More and more, there is doubt in the country that the Supreme

106 Id. at 380.
107 211 U.S. 78 (1908).
108 Black, J., 357 U.S. 371 at 382 (1958).
109 SCHWARTZ, THE SUPREME COURT 342 (1957).

Court is properly performing its function of guarding the constitutional ark. It is true that the Court has been under attack often before in our history. But never before have such criticisms had so wide a base in the community. Great judges like Learned Hand[110] have joined with scholars like Edward S. Corwin[111] to cast doubt on the Court's performance.

What is particularly distressing to one who studies the Court in operation is the apparent failure of most of its members to act with a full realization of the fact that the strength of the high tribunal arises from its operation as a collegiate institution. It may be, as John Winthrop expressed it in 1644, that "Judges are Gods upon earth," but a pantheon that speaks with nine separate voices can hardly inspire the listener with any feeling of divine certainty.

A court vested with the awesome powers entrusted to our highest tribunal can function effectively only if it speaks as an organic entity. If it voices merely the individual views of its members, the authority of its pronouncements can never be quite the same. In recent years, as is well known, the institutional ethos of the Court has been at its weakest. "The fact is," wrote Justice Jackson just before his death, "that the Court functions less as one deliberative body than as nine."[112] Since this was written, there has, if anything, been an intensification in the internal atomization of the Court.

The past term has seen no diminution in this tendency. Certainly there has been no decrease in the readiness of the justices to articulate their individual views in concurrences or dissents. Almost every case of importance last term saw a sharp division in the Court. The present justices express disagreement with their colleagues with an alacrity that would have shocked earlier Courts.

Nothing takes away more from the prestige of the highest tribunal than constant public articulation of dissidence among its members. Especially is this true insofar as public expressions of acerbity among the justices is concerned.

During oral argument on October 15, 1957, the Chief Justice was questioning an attorney, when Justice Frankfurter interrupted. "If I may restate the question of the Chief Justice," he began. Warren's face reddened. A little later, the attorney was an-

110 HAND, THE BILL OF RIGHTS (1958).
111 Letter to the Editor, N.Y. TIMES, March 16, 1958.
112 JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 16 (1955).

swering another question put by the Chief Justice, when Frankfurter again broke in. This time, Warren whirled in his chair, faced Frankfurter, and literally shouted: "Let him answer *my* question! I want to hear the answer to *my* question!"

Justice Frankfurter, clearly shaken, explained that he was only trying to clear up the attorney's confusion. "He is confused enough as it is," retorted the Chief Justice. "Confused by Justice Frankfurter, I presume," riposted Frankfurter.[113]

This type of backbiting in public has characterized several sessions of the Court during the past term. True, the present situation in this respect has not deteriorated to anything like that in the Court under Chief Justice Stone, when a series of bitter personal feuds brought the high bench close to institutional chaos. But the flowering of personal dissension on the Court threatens to destroy what had been hoped to be Earl Warren's main contribution to the supreme tribunal. Dissonance among the justices bids fair to become the dominant characteristic that it was in the Court between Hughes and Warren.

The discord graphically illustrated by the Warren-Frankfurter squabble is more than a result of personality conflicts among the justices. There is a fundamental division on the Court with regard to the proper performance of the judicial function. The leading advocates of the two wings of the Court are Justice Frankfurter, on the one side, and Justice Black, on the other. The basic difference in approach as between these two justices is well shown by the opinions read by them in *Green v. United States*.[114]

The *Green* case arose out of the conviction of the ten principal leaders of the Communist Party for violation of the Smith Act. Two of the defendants failed to appear in court under a surrender order and instead remained fugitives for four and a half years. After their ultimate surrender, the United States instituted criminal contempt proceedings against them, which were tried to the court without a jury. Following a hearing, the court found them guilty and sentenced them to three years' imprisonment. The Supreme Court affirmed, holding that the evidence was sufficient to establish the guilt of the contempt charged and that the sentences imposed were not excessive.

Justice Black, who delivered the principal dissent, did not at

113 See Osborne, in LIFE, June 16, 1958, p. 93.
114 356 U.S. 165 (1958).

all confine himself to these relatively narrow grounds. Instead, he seized the occasion to attack the very basis of the criminal contempt power. "In my judgment," he asserts, "the time has come for a fundamental and searching reconsideration of the validity of this power."[115] He goes on to declare that it is unconstitutional for a criminal contempt case to be tried without a jury: "I would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for 'all criminal prosecutions.' "[116]

Justice Black recognizes, of course, that all of the case law on the subject is contrary to his position. But he would reject the precedents. "I am convinced that the previous cases to the contrary are wrong."[117] His personal conviction leads him cavalierly to cast aside as large a mass of decisional authority as one could find on any point in our public law.

The Black approach in *Green* led Justice Frankfurter to read a caustic concurrence. In his view, the Black conviction on the desirability of procedures for punishment of criminal contempt is hardly enough to wipe out a century and a half of judicial history. In over two-score cases in the Supreme Court, not to mention countless decisions in the lower courts, the power to punish for contempt without a jury has been accepted without question. The list of justices who have sustained the exercise of this power includes every justice who sat on the Court since 1874, with two exceptions, as well as such judicial giants as Marshall and Story, at an earlier date. To say that everybody on the Court has been wrong for 150 years is an assertion that is as precarious as it is presumptuous.

To Justice Frankfurter, the judicial lodestar is the doctrine of self-restraint. The judge must not treat constitutional law as carte blanche upon which he can scribble in accordance with his personal predilections. He must, on the contrary, respect the accumulated experience contained in prior decisions of the Court. Just as important, in the Frankfurter view, is deference to the legislator. The judge, as he sees it, must be controlled by the conviction that it is an awesome thing to strike down an act of the elected representatives of the people, and that his power

[115] Id. at 193-194.
[116] Id. at 194-195.
[117] Id. at 195.

to do so should not be exercised save where the occasion is clear beyond fair debate.[118] "The awesome power," reads a key portion of Frankfurter's dissent in the already-discussed *Trop* case, "of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."[119]

To the judge who acts in accordance with Justice Black's approach, the Frankfurter doctrine ties the judicial hands unduly. Even when the line of contrary authority is as impressive as it is in a case like *Green,* that cannot be permitted to stand in the way of a policy which he happens to deem desirable. Such a judge exhibits a constant readiness to undo the work of his predecessors whenever he himself would not have made the initial determination. To him, the power to invalidate legislation must be exercised as if it stood as the sole bulwark against unwisdom or excesses of the moment.[120]

Justices Black and Frankfurter are, without a doubt, the key polar figures on the present Court. And the high tribunal itself is sharply divided as between the two rival philosophies. The Black view can usually count on the backing of the Chief Justice, as well as that of Justices Douglas and Brennan. The more restrained approach is supported by Justices Burton,[121] Clark, and Harlan. Justice Whittaker has been found in both camps, but he is more often with the Frankfurter view.

Any such lineup of the justices is, of course, an oversimplification. It is especially true of men as erratic as those who sit on the Court today that they cannot neatly be fitted into preconceived pigeonholes. Even Justices Frankfurter and Black are idiosyncratic in individual cases. Thus, in *Caritativo v. California,*[122] the Court held that it did not offend due process for a state to leave to the prison warden the determination of the sanity of a man condemned to death. In the particular case, the warden refused to hear evidence of insanity tendered on petitioner's behalf and refused to allow an examination by independ-

118 Paraphrasing, JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 323 (1941).
119 356 U.S. 86 at 128 (1958).
120 Paraphrasing ibid.
121 So far as one can judge from his past record, Justice Stewart, who took Justice Burton's place on the Court in October 1958, can be expected to follow a similar approach.
122 357 U.S. 549 (1958).

ent psychiatrists. If there was any case where an activist judge like Black would intervene, it would seem to be this one. As the dissent eloquently puts it, "The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the sad history of its denial, than inconvenience in the execution of the law."[123] But this dissent was written by Justice Frankfurter. Justice Black, on the other hand, silently joined in the Court's decision. The individual vagaries of the justices in particular cases do not, however, change the fact that the Court is, by and large, divided into two opposed points of view with regard to the essential nature of the judicial function. And if there is any one factor that has contributed to the mounting criticism of the present Court it has been the strength shown on it of the Black activist position. Indeed, with few exceptions, the controversial decisions of the past two terms have been those in which a majority of the justices have followed the propensity of Justice Black to remake our constitutional law in his own image.

A high Court which, in effect, reverts to the position of originating lawmaker is bound to encounter popular opposition. This is especially true when the tribunal itself is composed of men who give all too frequent evidence of being unversed in the intricacies of our public law and procedure. Such men will inevitably be deficient even in adequately explaining the bases of their actions. Their opinions will tend to be homilies in political science. Their language will be turgid and verbose; their reasoning prolix and obscure. All too often, they will ignore the distinction between *obiter* and *ratio* and the appropriate weight to be given to different types of legal and non-legal authority.

"We must know what a decision means before the duty becomes ours to say whether it is right or wrong," reads an oft-quoted statement of Justice Cardozo.[124] Observers of the high Court in operation are equally entitled to know just what its decisions mean. Of course, as Alice's king said, "If there is no meaning in it, that saves a world of trouble you know, as we needn't try to find any." But this hardly seems a proper method for an ultimate judicial tribunal to follow—at least not this side of Wonderland.

[123] Id. at 558.
[124] United States v. Chicago, M., St. P. & P. R., 294 U.S. 499 at 511 (1935).